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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 626

SARAH B. DANNING, Trustee in Bankruptcy of the Estate of Samuel N. Sherman, dba Southern California College of Business, Bankrupt,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

MARTIN GENDEL,
6435 Wilshire Boulevard,
Los Angeles 48, California,
Counsel for Petitioner.

GENDEL & RASKOFF,
MILES RASKOFF and
O. Z. TIGERMAN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

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IN THE

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No. .....

SARAH B. DANNING, Trustee in Bankruptcy of the Estate of Samuel N. Sherman, dba Southern California College of Business, Bankrupt,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Sarah B. Danning, as trustee in bankruptcy of the Estate of Samuel N. Sherman, dba Southern California College of Business, prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on August 28, 1958; and upon which a Petition for Rehearing was denied December 9, 1958. That judgment affirmed the judgment of the bankruptcy court (both that of the Referee in Bankruptcy and the United States District Court for the Southern District of California, Central Division) rendered on March 8, 1957.

Opinions Below.

The opinion and judgment of the Court of Appeals for the Ninth Circuit (259 F. 2d 305) is set forth in its entirety at pages 60-71 of the record herein and, for the convenience of this Court, is printed as an appendix to this petition. The District Court wrote no opinion but its order is included as a part of this record at pages 50 and 51. The opinion and order of the Referee in Bankruptcy are set forth in their entirety at pages 25 to 38 of the record herein.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on August 28, 1958. [Tr. 71; App. 14]; an order of the Court of Appeals for the Ninth Circuit denying a Petition for Rehearing and Reconsideration was filed on December [redacted]958. [Tr. 108]. The jurisdiction of this court is invoked under Title 28, U. S. C., Section 1254, as amended by the Act of June 25, 1948 (Public Law 773, 80th Congress, Chapter 646, Second Session) and as further amended and under Section 24(c) of the Bankruptcy Act, 11 U. S. C., Section 47(c).

Questions Presented.

The questions here presented for determination are extraordinarily important to the administration of bankruptcy estates, but may be stated very briefly. They are as follows:

1. Does the Bankruptcy Act,[1] as amended, grant jurisdiction to courts of bankruptcy to hear and determine

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[1]Act of July 1, 1898, as amended; 11 U.S.C., Sec. 1, *et seq.*

counterclaims for affirmative relief asserted by a trustee in bankruptcy against the United States in amounts greater than the claim filed by the United States where the counterclaim arises out of the same transaction or transactions upon which the Government's claim is based?

2. Does the Bankruptcy Act, as amended, constitute the United States a creditor in a bankruptcy proceeding for all purposes?

3. Is the United States exempt from the obligation of all creditors seeking equity in bankruptcy to do equity with regard to the subject matter before the court?

Statutes Involved.

This petition requires a consideration of the following provisions of the Bankruptcy Act:

1. Section 1(11) of the Bankruptcy Act defines "creditor" as "anyone who owns a debt, demand or claim provable in bankruptcy . . ."[2]

2. Section 2(a) of the Bankruptcy Act[3] sets forth a list of specific matters with respect to which the Bankruptcy Court is given jurisdiction. The relevant specific matters are as follows:

> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; . . .
>
> "(6) Bring in and substitute additional persons or parties in proceedings under this Act when necessary for the complete determination of a matter in controversy;

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[2] 11 U.S.C., Chap. 1, Sec. 1(11).

[3] 11 U.S.C., Chap. 2, Sec. 11(a).

"(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controveries in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction; . . .

"(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act; *provided, however,* that an injunction to restrain a court may be issued by the Judge only; . . ."

3. Section 2 concludes with the following subparagraph:

"(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."[4]

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[4] 11 U.S.C., Chap. 2, Sec. 11(b).

4. Section 57(n) expressly provides that the claims of the United States are provable and allowable claims, stating:

> "Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any state or any subdivision thereof, shall be proved and filed in the manner provided in this section . . ."[5]

5. Section 64 expressly includes obligations owing to the United States as "debts" which have the fifth priority.[6]

6. Section 68(a) provides:

> "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."[7]

7. The General Orders and official forms prescribed by this Honorable Court are promulgated pursuant to authorization given by Section 30 of the Bankruptcy Act.[8] General Order 38 adopted by this Court on January 16, 1939[9] provides that the forms annexed to the General Orders are to be observed and used. The official forms numbered 28, 29, 30 and 31 are all forms of proofs of claim and in each of said official forms there is the following language:

> "That there are no set-offs or counterclaims to said debt, except . . ."

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[5] 11 U.S.C., Chap. 6, Sec. 93(n).

[6] 11 U.S.C., Chap. 7, Sec. 104.

[7] 11 U.S.C., Chap. 7, Sec. 108(a).

[8] 11 U.S.C., Chap. 4, Sec. 53.

[9] 59 S. Ct. clxxxiv.

Statement.

The bankruptcy proceedings out of which this appeal arises were commenced on December 19, 1952, upon the filing of an involuntary petition against the bankrupt [Tr. 3-6]. There was an adjudication in bankruptcy on February 4, 1953 [Tr. 8], and the first meeting of creditors was duly noticed for and held on March 9, 1953, on which date the trustee was elected [Tr. 10]. On the same date, March 9, 1953, the Government filed its original claim, based upon certain contracts between the Veterans Administration and the bankrupt [Tr. 11-15]. Upon the basis of said claim, the Government actively participated in the election of the trustee. The Government conceded in its claim that the bankrupt had not submitted vouchers under the very same contracts described in the Government's claim, for certain periods of time for which he would be entitled to payment [Tr. 14]. This statement in the claim immediately follows the required allegation that there are no set-offs or counterclaims to the claim. On April 3, 1953, the trustee filed her counterclaim and objection to the Government's claim in its entirety, and sought an affirmative judgment against the United States for moneys owing to the bankrupt pursuant to the identical Veterans Administration contracts upon which the Government's claim was based [Tr. 19-23]. By virtue of this circumstance, the counterclaim was a compulsory counterclaim and therefore contained the allegation that the counterclaim arose out of the same transactions and occurrences that were the subject matter of the Government's claim [Tr. 21].

During a three-year period commencing in the year 1953, the trustee, through her counsel and the office of the United States Attorney in Los Angeles, engaged in

extended and prolonged negotiations in an effort to compromise or settle the respective obligations of the parties hereto [Tr. 27].

On June 15, 1956, the Government filed its motion to withdraw its claim and dismiss the counterclaim and, for the first time, raised the question of the jurisdiction of the bankruptcy court to hear and determine the counterclaim [Tr. 24-25].

After a hearing on the Government's motion, the Referee entered an order allowing the withdrawal of the claims of the Government and dismissing the counterclaim of the trustee [Tr. 37-38], and upon review, the district court affirmed the order of the Referee [Tr. 50-51]. Your petitioner took an appeal to the Court of Appeals for the Ninth Circuit which affirmed the district court [Tr. 71].

The court of appeals acknowledged that Section 68(a) of the Bankruptcy Act grants the bankruptcy court jurisdiction to enter a judgment against a claimant upon a counterclaim asserted by a trustee as an objection to the claim [Tr. 61], and further affirmatively held that the Chandler Act amendment of 1938 changed the set-off provisions of Section 68(a) of the Bankruptcy Act by including the United States as a "creditor" although the United States is not expressly mentioned in that section [Tr. 64; App. 6]. However, the court affirmed the district court decision on the ground that, although it could subject the Government to the provisions of Section 68(a) by implication "for some purposes," it was unable to apply Section 68(a) against the Government for all purposes and was thus unable to find authority in the Bankruptcy Act permitting an affirmative judgment against the United States [Tr. 67; App. 9]. A Petition for Rehearing and

Reconsideration was denied [Tr. 108] and petitioner now seeks a review by certiorari of the judgment of the Court of Appeals for the Ninth Circuit.

Reasons for Granting Writ.

The question of the jurisdiction of the bankruptcy court to hear and determine affirmative counterclaims against a claimant is of vital importance to the administration of the Bankruptcy Act. That the additional question of whether the Government occupies a different position from that of a private claimant in bankruptcy should be settled by this court, would seem to be self-evident. Petitioner feels that the following are among the special and important reasons for a granting of a review on Writ of Certiorari in this case:

1. The Court of Appeals for the Ninth Circuit has rendered a decision in conflict with the decisions of other courts of appeals on the issue of whether a bankruptcy court has jurisdiction to hear and determine an affirmative counterclaim against a claimant in bankruptcy. The Second, Third, Fourth, Seventh, Eighth, and Tenth Circuits have all held in favor of the jurisdiction of the bankruptcy court.[10] While the Court of Appeals for the Ninth Circuit seemingly recognized and approved the rulings in these circuits, it reached a contrary result in the instant case upon the basis of a rule of construction that the sovereign is not bound by a provision in the

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[10]*Chase National Bank v. Lyford* (2d Cir., 1945), 147 F. 2d 273; *In re Solar Mfg. Corp.* (3rd Cir., 1952), 200 F. 2d 327; *Columbia Foundry v. Lochner* (4th Cir., 1950), 179 F. 2d 630; *Matter of Majestic Radio & Television Corp.* (7th Cir., 1955), 227 F. 2d 152; *Floro Realty & Investment Co. v. Steem Electric Corp.* (8th Cir., 1942), 127 F. 2d 338; *Interstate National Bank of Kansas City v. Luther* (10th Cir., 1955), 221 F. 2d 382.

Bankruptcy Act in which it is not expressly named. This reasoning, however, conflicts with the rationale adopted by the Court of Appeals for the Second Circuit in *United States v. Roth* (1948), 164 F. 2d 575, in which legislative authorization was found for the treatment of the United States as any other creditor with respect to setoffs. The ruling below is also in direct conflict with the holding of a district court decision in the Tenth Circuit in *In re Ward* (1955), 131 Fed. Supp. 387.

2. This case presents an important question of Federal Bankruptcy Law which has not yet been, but should be, settled by this Honorable Court. The question as to the jurisdiction of a Bankruptcy Court to hear and determine an affirmative counterclaim was presented to this Court in *Interstate National Bank of Kansas City v. Luther* (10th Cir., 1955), 221 F. 2d 382 in which certiorari was granted (350 U. S. 810, 76 S. Ct. 77) but the issue was not resolved by reason of the fact that the case was dismissed by stipulation of counsel prior to any decision by the Court (350 U. S. 944, 76 S. Ct. 297). In addition to the reasons that existed for the granting of the Writ in the *Luther* case, the fact that the instant case concerns the status of the United States as the party against whom the counterclaim is asserted renders the matter of even greater importance than *Luther*.

3. This case affords this Court an opportunity to rule upon a situation directly affecting the speed and efficiency of bankruptcy administration throughout the United States as well as to eliminate a multiplicity and circuity of actions. If, as held by the court below, the bankruptcy court does not have jurisdiction to hear and determine an affirmative counterclaim, the controversy is one that would have to be determined in the Court of Claims. However,

the bankruptcy court concededly has jurisdiction to hear and determine any objections to the claim even though they may involve the same issues as would be involved in the counterclaim. The matter would then be tried in the bankruptcy court as well as the court of Claims. A ruling in the instant case will enable this court to determine whether the litigation of two separate actions involving the same parties and subject matter is necessary.

I.

Whether the Bankruptcy Court Has Jurisdiction to Hear and Determine an Affirmative Counterclaim Against the United States Is of Great National Importance in Bankruptcy Administration.

The question here presented is of such consequence that any ambiguity existing in this matter should be settled with finality. In almost every bankruptcy case, claims are filed by federal and state authorities concerning the claims of the sovereign entities to certain of the assets of the bankrupt estate. In a great number of these instances the trustee of the estate possesses some counterclaim against these authorities. The power of the bankruptcy court to adjudicate these counterclaims is, therefore, an issue of consequence in a large number of bankruptcy proceedings.

The effect of the decision of the Ninth Circuit in the instant case is to encourage multiplicity of actions by forcing a trustee in bankruptcy to institute a separate and sometimes costly action against the Government in the United States Court of Claims even though the bankruptcy court has concurrently obtained jurisdiction over both the parties and the subject matter of the controversy. In addition, the ruling below compels the expenditure of additional time and funds by both the trustee in bankruptcy

and the Government in litigating the claims between them.[11] This results in unnecessary delay in the winding up of bankrupt estates and a depletion of the funds which would otherwise be available to creditors.

II.

The Holding of the Ninth Circuit Is Contrary to and in Conflict With the Theory and the Rationale of Other Circuit Court Decisions.

While the Court of Appeals for the Ninth Circuit acknowledged that the rule is now firmly established that under the Bankruptcy Act the bankruptcy court has jurisdiction to hear and determine a trustee's counterclaim for affirmative relief asserted by a trustee in bankruptcy against a private claimant in an amount in excess of the amount of the claim filed[12] [Tr. 61; App. 1], this Honorable Court has not as yet had an opportunity to pass on this question. This Court did, however, grant certiorari in the case of *Interstate National Bank of*

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[11]See Footnote 19, *infra*.

[12]*Chase National Bank v. Lyford* (2d Cir., 1945), 147 F. 2d 273; *In re Solar Mfg. Corp.* (3rd Cir., 1952), 200 F. 2d 327; *Columbia Foundry v. Lochner* (4th Cir., 1950), 179 F. 2d 630; *Matter of Majestic Radio & Television Corp.* (7th Cir., 1955), 227 F. 2d 152; *Flora Realty & Investment Co. v. Steem Electric Corp.* (8th Cir., 1942), 128 F. 2d 338; *Interstate National Bank of Kansas City v. Luther* (10th Cir., 1955), 221 F. 2d 382.

Prior to the decision in *In re Nathan* (1951), 98 Fed. Supp. 686, there had been considerable confusion concerning the jurisdiction of the bankruptcy court to hear and determine claims of this nature. However, Judge Mathes' exhaustive and scholarly opinion has become and remains a landmark decision in bankruptcy law. (Jurisdiction of a Referee in Bankruptcy to Render Affirmative Judgment on a Counterclaim in Favor of a Trustee, 26 So. Cal. L. Rev. 107; (1952) 27 Journal of Nat'l Assn. of Referees in Bankruptcy 90; (1955) Nadler: Summary Jurisdiction to Render Affirmative Judgment on Counterclaims, Setoffs and Reclamation, 29 Journal of Nat'l Assn. of Referees in Bankruptcy 39; (1952) 37 Iowa L. Rev. 431; (1952) 27 N. Y. U. L. Rev. 142).

Kansas City v. Luther (10th Cir., 1955), 221 F. 2d 382, cert. granted 350 U. S. 810, 76 S. Ct. 77, which squarely presented this question, but that case was dismissed by stipulation of counsel prior to any decision by the Court. (350 U. S. 944, 76 S. Ct. 297.) The instant case, therefore, presents the same issue to this Court as was involved in the *Luther* case and the same reasons for granting certiorari in the *Luther* case are herein present. Although the Government and the court below, in line with the rationale of *Luther*, have conceded the jurisdiction of the bankruptcy court in the situation where the claimant is a private party, the Government successfully contended that the rule applicable to private claimants is not applicable where the Government is the claimant. The question in our case therefor, is of even greater consequence in the administration of the Bankruptcy Act than the question presented by the *Luther* case.

The Court of Appeals for the Ninth Circuit in addition to recognizing the rule of the *Luther* case, also purported to agree with the decision of the Second Circuit in *United States v. Roth* (1948), 164 F. 2d 575. In the latter case, it was held that the effect of the 1938 amendments to the Bankruptcy Act was to constitute the United States as a creditor subject to the provisions of Section 68(a) of the Act. The Second Circuit arrived at this conclusion after reviewing and analyzing the amendments from which it found the aforesaid specific legislative authorization.[13] If, as acknowledged by the Ninth Circuit,

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[13] Although the Court of Appeals for the Second Circuit in the *Roth* case dealt only with an offset against the Government's claim and expressly declined to pass upon the question of an affirmative judgment against the United States on the theory that the problem was "not presented by this record" (164 F. 2d 575 at 578, note 7), the rationale of the *Roth* opinion compels the same result in

there is jurisdiction in the bankruptcy court to hear and determine a counterclaim for relief in excess of the amount of the claim against a private claimant, and if the United States is a creditor like any other creditor under Section 68(a) of the Act, it is erroneous to conclude, as did the Ninth Circuit, that there is no jurisdiction to hear and determine the counterclaim in the instant case. Thus, it necessarily follows that the result in the instant case is in direct conflict with the rationale of the Second and Tenth Circuits in the *Roth* and *Luther* decisions. The Ninth Circuit, in addition, expressly disagreed with the decision of the District Court of Colorado in the case of *In re Ward* (1955), 131 Fed. Supp. 387, which, following the concept of the *Roth* decision, held contrary to the decision below.

III.

The Decision of the Ninth Circuit Is Predicated on Doctrines Previously Enunciated by This Court Which Are Not Applicable Under the Present Bankruptcy Act.

The Court of Appeals for the Ninth Circuit in the instant case expressly held that it was the intent of Congress to subject the sovereign to the terms and provisions

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either instance. In the *Roth* decision, the Court referred to an apparently contrary decision of the Court of Appeals for the Third Circuit in the matter of *Monongahela Rye Lighters* (1944) 144 F. 2d 804, only expressly to disagree with it. The Second Circuit felt that the 1938 Amendments, which it was persuaded constituted legislative authorization for treating the United States as any other claimant with respect to offsets, had not been called to the attention of the Court of Appeals for the Third Circuit. The *Monongahela* case was relied upon by the Government in its argument before the Ninth Circuit as was *Greenstreet v. United States* (1954), 209 F. 2d 600, which was cited at length by the Court in its opinion. The observations of the Second Circuit in *Roth* with respect to *Monongahela*, are equally applicable to the *Greenstreet* decision.

of Section 68(a)[14] of the Bankruptcy Act, as amended by the Chandler Act; however, the court felt itself bound by the decision of this Court in *United States v. Shaw* (1940), 309 U. S. 495, 60 S. Ct. 659, and was therefore unable to apply Section 68(a) to the United States as it would to any other "creditor" [Tr. 63; App. 4].

Both the Referee [Tr. 33-36] and the Court of Appeals reasoned that on the basis of *Shaw*, concerning the right of an executor to counterclaim against the United States in a probate proceeding in a Michigan court, and its companion case, *United States v. U. S. Fidelity and Guaranty Co.* (1940), 309 U. S. 506, 60 S. Ct. 653, the United States was not bound by the provisions of any code section in which it was not expressly named.[15] This premise is questionable in the light of the scope and intent of the Bankruptcy Act as amended. Indeed, the Court of Appeals for the Second Circuit expressly held in *United States v. Roth* (1948), 164 F. 2d 575, that the effect of the 1938 Amendments to the Bankruptcy Act was to treat the United States as a creditor, like any other creditor, particularly with reference to Section 68(a), even though the United States is not expressly named therein.

Similar reasoning has resulted in the application of other sections of the Act to the United States; debts owing the United States, other than those for taxes, are

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[14] 11 U.S.C., Chap. 7, Sec. 108(a).

[15] *United States v. Shaw* involved a Michigan probate proceeding and, therefore, cannot be said to be controlling in a situation governed by the provisions of the national Bankruptcy Act. *United States v. U. S. Fidelity & Guaranty Co.* arose out of reorganization proceedings under the Bankruptcy Act as it existed prior to the Chandler Act amendments of 1938. These amendments, according to the Second Circuit in the *Roth* case, supplied the necessary legislative authorization to make Section 68(a) applicable to the United States.

dischargeable pursuant to the provisions of Section 17 even though the United States is not expressly named therein (see *Parker v. United States* (1st Cir., 1946), 153 F. 2d 66), and the trustee may make objections to claims filed in the bankruptcy estate by the United States pursuant to the provisions of Section 57(f) even though the United States is not expressly named therein (see *In re Fahnestock Mfg. Co.* (D. C., Pa., 1925), 7 F. 2d 777).

The Court of Appeals at the outset of its opinion disposed of petitioner's contention that the claim of sovereign immunity in the instant case was a "false issue" by the statement that "this is mere semantics." However, regardless of the words used, the true issue is whether under the provisions of the Bankruptcy Act there is any basis for the conclusion that the Government as a claimant occupies a different position from any other claimant before the bankruptcy court. Petitioner contends that there is no basis in the Bankruptcy Act for this conclusion; rather, that by express provision of the Bankruptcy Act the Government is treated as any other creditor.

The doctrine that the United States cannot be bound by a statute in which it is not expressly named has been held to be merely a "canon of construction." In *United States v. State of California* (1936), 297 U. S. 175, 56 S. Ct. 421, the State of California objected to the attempted application of the Federal Safety Appliance Act to a state owned and maintained railway. Mr. Justice Stone stated for the Court:

> "Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statutes unless named in it (citing cases). This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Par-

liament not specifically directed against it (citing cases). The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated (citing cases) . . . . Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be entirely artificial."

See also, *United States v. Rice* (1946), 327 U. S. 742, 66 S. Ct. 835.

The clear intent of the Bankruptcy Act as amended by the Chandler Act of 1938 is that the United States occupy the position of a creditor of the bankrupt estate subject to the terms and provisions of the Bankruptcy Act; that this aim is "fairly to be inferred" from the very language of the Act and from the obvious impracticality of refusing to apply to the United States those sections of the Act wherein it is not expressly named. The "canon of construction" that the sovereign is not bound by its own statute unless named therein cannot be selectively applied to particular portions of the Bankruptcy Act where to do so would thwart the very aim and intent of the Bankruptcy Act and by its application create an entirely artificial result.

The *Shaw* case has been subject to many and varied interpretations as to the jurisdiction of a court over an affirmative counterclaim against the sovereign. The application by the courts of the doctrine of the *Shaw* case to attempt legislative waiver of Governmental immunity has created some conflicting and confusing results.

in suits involving the Tucker[16] and Miller[17] Acts [see the Circuit Court's opinion in the instant matter, Tr. 68, App. 4-5; see also Casey, *Counterclaims against the United States Under the Tucker Act: A Dilemma for Defendants*, 25 George Washington L. Rev. 315, 325 (1957)]. It is submitted that this Court should clear the confusion and ambiguity that will exist by virtue of the unwarranted application of this doctrine to the jurisdiction of courts of bankruptcy.

The Circuit Court's opinion in this case has placed that Court in the position of saying that it was the intent of the legislature to include the United States within the purview of the provisions of Section 68 of the Bankruptcy Act for one purpose, but not for another. It is submitted that this position is untenable; either the section applies to the United States or it does not. The selective invocation of the doctrine of sovereign immunity within the framework of a comprehensive, all-embracing Act of the legislature, can only create chaos in the administration of bankrupt estates. To permit the application of the foregoing rule and deny the full application of the terms of the Bankruptcy Act to the United States as a "creditor" thereunder would place the Government in a position to "reach out with Briarean arms to gather the benefits . . .; And then draw back under the protection of its sovereign immunity even while an accounting upon its claim before the Referee in Bankruptcy is in progress." (*In re Ward* (1955), 131 Fed. Supp. 387 at p. 396.)

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[16] 28 U.S.C., Secs. 1346, 1491.

[17] 40 U.S.C., Secs. 270(a)-270(d).

IV.

The Decision Below Conflicts With Established Equitable Doctrines Previously Enunciated by This Court and Applied by Courts of Appeals in Other Circuits.

The Bankruptcy Act creates by its provisions separate courts of bankruptcy and vests them with jurisdiction. Although courts of bankruptcy are also United States District Courts, the jurisdiction in bankruptcy is independent of the jurisdiction of the court sitting as the United States District Court (*Hanna v. Brickston* (8th Cir., 1932), 62 F. 2d 139).

The bankruptcy court is, in essence, a court of equity and the proceedings of the bankruptcy court are inherently proceedings in equity (*Local Loan Co. v. Hunt* (1934), 292 U. S. 234, 54 S. Ct. 695; *Pepper v. Litton* (1939), 308 U. S. 295, 60 S. Ct. 238). It is also an established principle that the bankrupt estate is in effect a *res* (*Gardner v. State of New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467).

It has become well settled that when the United States seeks relief from a court of equity it is as much bound to do equity as any other private litigant. In *Jacobs v. United States* (4th Cir., 1957), 239 F. 2d 459, the Government brought an action against Jacobs, a government contractor, to require him to turn over certain records and drawings to the United States. The contractor filed a counterclaim under the contract. The district court held that the contractor should turn over certain tangible physical property to the Government and permit the Government to make certain copies and microfilm records of certain records of the contractor but as a condition of this relief, the court required that the Government pay to the con-

tractor the sum of $20,000.00, on account of the counterclaim. The Court of Appeals for the Fourth Circuit upheld the district court stating that it was "a well settled principle that he who seeks equity must do equity, a principle binding upon the Government as well as upon individuals." A writ of certiorari to this court was denied ((1957) 353 U. S. 904, 77 S. Ct. 666).

In *Lacy v. United States* (5th Cir., 1954), 216 F. 2d 223, the Government sued for an injunction requiring a property owner to remove certain buildings and stacks of lumber from a right-of-way claimed by the Government for construction and maintenance of power transmission lines. The property owner filed counterclaims seeking damages for trespass. The district court granted a summary judgment for the Government and ordered the counterclaims dismissed. The Court of Appeals for the Fifth Circuit reversed the district court and held that:

> "The Government when applying for relief in a court of equity is as much bound to do equity as a private litigant. (Citing cases.) When the United States comes into court to assert a claim, it so far takes the position of a private suitor, as to [illegible]e by implication that justice may be done with regard to the subject matter (United States v. The Thekla, 266 U. S. 328, 339, 340, 45 S. Ct. 112, 113). It is true that that principle cannot be pressed to the extent of waiving the sovereign immunity to suit by way of counterclaim (United States v. Shaw, 309 U. S. 495, 502, 60 S. Ct. 659). The Government, however, is still bound to do equity and, as a condition precedent to relief in this case, either to agree upon and pay to the property owner such compensation as it may owe him or, failing such agreement, to file the necessary proceedings for the ascertainment of such compensation."

It has long been the rule of admiralty law that counterclaims against a sovereign for an amount in excess of the sovereign's claim in the admiralty court are permitted. This Court, speaking through Mr. Justice Holmes in *Luckenbach S.S. Co., Inc. v. The Thekla* (1924), 266 U. S. 328, 45 S. Ct. 112, ruled against the Government's contention that the court of admiralty could not determine a counterclaim against the Government, stating that when the United States comes into court to assert a claim, it so far takes the position of a private suitor as to impliedly agree that justice be done with regard to the subject matter before the court.

The equitable rule applied by Mr. Justice Holmes in the *Thekla* decision and by the Circuit Courts in the *Jacobs* and *Lacy* cases, was first applied by this Court to the issue of the jurisdiction of courts of equity to grant affirmative relief on counterclaims in *Alexander v. Hillman* (1935), 296 U. S. 222, 56 S. Ct. 204, a case concerning an equitable receivership. The doctrine of the *Hillman* case was subsequently applied to bankruptcy proceedings by implication in *Florance v. Kresge* (4th Cir., 1938), 93 F. 2d 784. However, as previously noted[18] considerable confusion persisted in this area of bankruptcy law until Judge Mathes' decision in *In re Nathan* (1951), 98 Fed. Supp. 686.

In *Inter-State National Bank of Kansas City v. Luther* (1955), 221 F. 2d 382, the Tenth Circuit after tracing the course of this equitable doctrine from *Alexander v. Hillman* through the *Nathan* case concluded (221 F. 2d 382 at 389):

> "From this it seems manifestly clear that the Bankruptcy Court is empowered to attach appropriate

[18]See Footnote 12, *supra*.

conditions to the allowance of a claim, including the power to require the claimant to do equity before receiving equity in the bankruptcy proceedings."[19]

The Referee, in his opinion in the instant case, disposed of Justice Holmes' opinion in the *Thekla* decision

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[19]The cases upholding the jurisdiction of courts of bankruptcy to hear, determine and enter affirmative judgments upon counterclaims show that one of the compelling reasons for this result is to avoid a meaningless circuity of actions. Thus, Judge Mathes stated in the *Nathan* case (98 F. Supp. 686, at 692), as follows:

> "The general policy of the Bankruptcy Act to effect 'quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay' Bailey v. Glover, 1874, 21 Wall. 342, 88 U. S. 342, 346, 22 L. Ed. 636, is supplemented by the provisions of §68, sub. a, 11 U. S. C. A. §108, sub. a, which in effect declare a statutory policy to settle all permissible claims or accounts 'between the estate of a bankrupt and a creditor.' See Cumberland Glass Mfg. Co. v. DeWitt, 1915, 237 U. S. 447, 454-457, 35 S. Ct. 636, 59 L. Ed. 1042."

A striking corollary to this statement is found in the opinion of this Court in *Cherry Cotton Mills v. United States* (1946), 327 U. S. 536, 66 S. Ct. 729, where the Court considered a contention that the Court of Claims did not have jurisdiction to determine a counterclaim asserted by the Government after the claimant had commenced an action in the Court of Claims:

> "Nor do we find any justification for giving to 250(2) the narrow interpretation urged. Its purpose was to permit the government, when sued in the Court of Claims, to have determined in a single suit all questions which involved mutual obligations between the government and a claimant against it. Legislation of this kind has long been favored and encouraged because of a belief that it accomplishes among other things such useful purposes as avoidance of 'circuity of action, inconvenience, expense, consumption of the courts' time, and injustice.' Chicago & N. W. Railway v. Lindell, 281 U. S. 14, 17, 50 S. Ct. 200, 201, 74 L. Ed. 670, and cases cited."

The statute referred to in this quotation (28 U. S. C., Sec. 250(1)) is quite similar to Section 68 of the Bankruptcy Act. The reasoning of this Honorable Court with respect to counterclaims asserted by the Government in the Court of Claims is equally applicable to counterclaims asserted against the Government in bankruptcy proceedings. The statutory provisions are substantially similar and the legislative policy the same.

merely by quoting from the opinion of this Court in *United States v. Shaw* (1940), 309 U. S. 495, 60 S. Ct. 659 [Tr. 35]. In the *Shaw* case, however, the Court was deciding whether a Michigan Probate Court could render an affirmative judgment on a counterclaim by the executor against the United States. Although the *Shaw* case states that the decision in the *Thekla* case is peculiar to courts of admiralty in that the claims concern a particular *res,* this Court did not then have occasion to consider whether the reasoning of the *Thekla* case was also applicable to bankruptcy proceedings. Bankruptcy courts, like admiralty courts, have a general jurisdiction separate and distinct from the jurisdiction of the United States District Courts. In the admiralty court, the proceedings are *in rem* and the subject matter is the collision; in the bankruptcy courts, the proceedings are likewise *in rem* and the subject matter is the distribution of the *res,* the bankrupt estate. (See *Gardner v. State of New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467; *Local Loan Co. v. Hunt* (1934), 292 U. S. 234, 54 S. Ct. 695.)

The *Nathan* and *Luther* decisions demonstrate that the doctrine enunciated by this Court in the *Thekla* decision and followed in the *Jacobs* and *Lacy* cases is equally applicable to courts of bankruptcy which exist as courts of equity before whom the *res* is the bankruptcy estate, and that the United States, as any person seeking equity in bankruptcy, must do equity so that justice may be done with respect to the subject matter before the court. To the extent that the doctrine of *United States v. Shaw, supra,* has been interposed in this area, it has denied the proper application of established equitable doctrine and has forced an unnatural and unnecessary construction of the Bankruptcy Act.

Conclusion.

The problem presented by this case is not one of suit against a sovereign without its consent; it is not the problem of a waiver by the consent of the executive branch of the Government; it is purely and simply whether the sovereign, having consented by Act of Congress to be treated as any other creditor before courts of bankruptcy, and having thus submitted itself to the jurisdiction of the bankruptcy court, may now avoid the consequences of the Bankruptcy Act to the extent that the sovereign is adversely affected thereby. In *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, where the State of New Jersey filed a claim in bankruptcy proceedings for taxes and then objected to the jurisdiction of a bankruptcy court to determine the objections to the state's claims by invoking the doctrine of sovereign immunity, Mr. Justice Douglas speaking for this Court, stated (329 U. S. at 573, 67 S. Ct. at 471):

> "It is traditional Bankruptcy law that he who invokes the aid of the Bankruptcy Court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. Wiswall v. Campbell, 93 U. S. 347, 351, 23 L. Ed. 923. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is nonetheless such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State

> becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim."

While the above case involved what appeared to be a defensive counterclaim, all of the reasons stated by Justice Douglas are equally applicable to the instant case which involves an affirmative claim; and the reasoning of Mr. Justice Douglas when coupled with the reasoning of the Second Circuit in the *Roth* decision, must produce a result contrary to that reached by the Ninth Circuit.

The very tenor and scope of the Bankruptcy Act as amended by the Chandler Act of 1938 intend that the United States, to the extent that it participates in the administration of bankrupt estates, assume the same posture as any other creditor before the bankruptcy court, and the various Circuit Courts' decisions above cited so indicate. The invocation of the doctrine to the effect that the United States is only partially and selectively bound by the effect of a statute because not specifically mentioned in certain sections thereof, creates a result which is contrary to the very scope and intent of the Bankruptcy Act and causes the administration of bankrupt estates to become unnecessarily complex and confused. It has never been the purpose of the concept of sovereign immunity to prohibit jurisdiction over the sovereign where properly invoked. As Mr. Justice Cardozo stated (as cited by this Court in *United States v. Aetna Casualty & Surety Co.* (1949), 338 U. S. 366, 383, 70 S. Ct. 207, 216):

> "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not going to add to its rigor by refinement of construction, where consent has been announced." (*Anderson v. Hayes Const. Co.* 243 N. Y. 140, 147, 153 N. E. 28, 29-30.)

This Honorable Court has recently observed that the doctrine of sovereign immunity is no longer favored in modern jurisprudence. In *National City Bank of New York v. Republic of China* (1955), 348 U. S. 366, 75 S. Ct. 423, Mr. Justice Frankfurter stated:

> "But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has been increasingly found to be in conflict with the growing subjection of governmental action to the moral judgment . . . . The outlook and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process."[20]

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[20]In dictum contained in *City of Newark v. United States* (1958), 254 F. 2d 93, the Court of Appeals for the Third Circuit commented on the issue presented by the instant appeal. The court stated (254 F. 2d 93 at 95, n. 1):

> "In the federal system, whenever the United States brings an action as plaintiff, it waives its sovereignty and assumes the status of a private individual for the purposes of counterclaim or defenses. The Siren, 1868, 7 Wall. 152, 154, 19 L. Ed. 129. Where the defendant has a claim against the United States 'it would be a very rigid principle, to deny him the right of setting up such a claim in a court of justice' * * *." United States v. Ringgold, 1834, 8 Pet. 150, 162, 8 L. Ed. 899. See also, United States v. The Thekla, 1924, 266 U. S. 328, 339-340, 45 S. Ct. 112, 69 L. Ed. 313. The general doctrine has been strengthened and extended by the recent decision of the Supreme Court in National City Bank of New York v. Republic of China, 1955, 348 U. S. 356, 75 S. Ct. 423, 99 L. Ed. 389."

If the ruling below is allowed to stand, it would mean in this case that after participating in the bankruptcy proceedings from their inception as a creditor, and after extensive negotiations for settlement over a period in excess of three years, the Government can for the first time compel the Trustee in Bankruptcy and the innocent creditors she represents to expend the additional time and money to have the very same matter now at issue before the bankruptcy court heard by the United States Court of Claims.

Wherefore, it is respectfully submitted that this petition for writ of certiorari be granted and that this Honorable Court review and reverse the judgment of the Court of Appeals for the Ninth Circuit.

Dated: December 30, 1958.

Respectfully submitted,

MARTIN GENDEL,

Counsel for Petitioner.

GENDEL & RASKOFF,
H. MILES RASKOFF and
BERT Z. TIGERMAN,
Of Counsel.

APPENDIX.

Opinion and Judgment of the United States Circuit Court of Appeals for the Ninth Circuit, Rendered August 28, 1958.

Before: STEPHENS, Chief Judge, CHAMBERS and BARNES, Circuit Judges.

BARNES, Circuit Judge:

This is a case where appellant urges that sovereign immunity is not in the case—only a question of whether the government consented to be sued by filing a claim in bankruptcy. But this is mere semantics, for if the government by its action "consented" to be sued, it had waived its sovereign immunity, even though its sovereignty was not impaired.

There is but one question involved in this case. Does a court of bankruptcy have jurisdiction to hear and determine a counterclaim for affirmative relief asserted by the trustee in bankruptcy against the United States arising out of the same transaction as the claim filed by the government in the bankruptcy proceedings? The Referee in Bankruptcy held that it did not have such jurisdiction, and a petition for review was denied by the District Court. The appeal here is timely and proper.[1] A recital of facts seems unnecessary.

It is apparently conceded by both parties here that if the United States Government were not the party claimant, and a mere creditor had filed a claim against the bankrupt's estate, then the bankruptcy court would have jurisdiction to enter a summary judgment against the claimant upon a counterclaim asserted by the trustee as an

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[1]Act of July 1, 1898, as amended, Chapter 541, Sec. 24.25, 30 Stat. 533, as amended. 11 U.S.C. §§47, 48.

objection to the claim. In re Nathan, 1951, 98 F.Supp. 686, 26 So.Cal. L. Rev. 167 (1952).

The government recognizes this general rule, but claims the doctrine of sovereign immunity overcomes the usual rule of law expressed in the Nathan case, prevents recovery, and requires a dismissal of the counterclaim, this being an "unconsented" claim against the government.

The government suggests that this rule of law respecting the sovereignty of the United States has been made clearly applicable to claims against the United States in summary bankruptcy proceedings by many cases, and particularly by United States v. U.S. Fidelity Co., 1940, 309 U.S. 506, holding void for lack of jurisdiction the affirmative decree of a summary bankruptcy court on a trustee's counterclaim against the United States.

Appellant replies that the Chandler Act Amendment of 1938[2] was enacted subsequent to the bankruptcy court judgment in the United States v. U.S. Fidelity case, *supra*; that the Second Circuit in United States v. Roth, 1948 164 F. 2d 575, held that the 1938 amendments to the Bankruptcy Act repealed the ruling of the Supreme Court in the U.S. Fidelity Co. case in that while §68(a) of the Bankruptcy Act (11 U.S.C. §108(a)) deals with set-offs and does not specifically name the United States (and hence there was no waiver of sovereignty with regard to set-offs), taxes owed to the United States are dealt with separately in §64(a); that before the 1938 Amendment, taxes could not be proved as claims and the court could only "order the Trustee to pay all taxes legally due and owing by the bankrupt to the United States"; but that

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[2]52 Stat. 840, 874.

after the Amendment, taxes owed the United States were classed as "debts" and provable as any other claim.

Although the United States is a claimant for purposes of collecting taxes under the 1938 Amendment, and thus there has been enacted a waiver of its sovereign immunity in that respect, has there been a waiver of immunity with respect to other "claims" against the United States? Such was the intent of Congress, says appellant, and "a reading of the Bankruptcy Act," and "particularly the provisions of §57,[3] demonstrates that Congress intended that the Government as a claimant should be upon exactly the same basis as any other claimant"; that "§68(a),[4] permitting set-offs, must be construed in harmony with the other provisions of the Act," and that "the absence of a specific reference to the United States in the set-off section can no longer be deemed significant." United States v. Roth, *supra*, at 578.

If we are to follow United States v. Roth reasoning, then we must agree

> "that the Act, as it now stands, treats the tax claim as a debt and the United States as a creditor which like other creditors, must make proof of claim on a form containing a statement about set-offs. Section 68, sub. a, 11 U.S.C.A. §108, sub. a, permitting set-offs, must be construed in harmony with the other provisions of the Act . . . the absence of a specific reference to the United States in the set-off section can no longer be deemed significant. Consequently we are able to find legislative authorization for set-offs against tax claims of the United States." United States v. Roth, *supra*, at 578.

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[3] 11 U.S.C. §93.

[4] 11 U.S.C.A. §108(a).

But to reverse here, we would be required to go one step further than does the Roth case. It will be remembered that in Roth, Judge Swan, on the question of affirmative relief against the government, states "whether the bankruptcy court could enter an affirmative judgment against the United States if the bankrupt's counterclaim had exceeded the government's tax claim, *is not presented by this record and need not be considered.*" [Emphasis added.] United States v. Roth, *supra,* at 578, n. 7.

The court then cites United States v. Shaw, 1940, 309 U.S. 495, 502 and United States v. Biggs, E.D.Ill., 1946, 46 F.Supp. 8, 11. The reason that issue was not determined in Roth was the holding in United States v. Shaw, which is, of course, binding on the Second Circuit as it is on us. And Shaw specifically holds:

> "It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress. We, of course, intimate no opinion as to the desirability of further changes. That is immaterial. Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off." United States v. Shaw, *supra,* at 502.

United States v. Biggs, *supra,* examined the immunity problem from the standpoint of the Tucker and Miller Acts, and said:

> "The principal purpose of the Court of Claims is to examine and determine claims for money against the United States. Ex parte Bakelite Corporation, supra; Williams v. United States, supra. * * *
>
> Under this state of the law can this counterclaim be allowed? If a suit is brought by the United States

against a defendant for an amount allegedly due the United States, defendant may properly set up by way of defense any amount owing him to the extent of such claim. The court, however, has no jurisdiction to render an affirmative judgment against the United States on a counterclaim. United States v. Shaw, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888; United States v. Nipissing Mines Co., 2 Cir., 206 F. 431; United States v. Eckford, 6 Wall. 484, 18 L.Ed. 920. In United States v. Nipissing Mines Co., supra, [206 F. 434], the court said: 'In our opinion, the Tucker Act of 1887 which gives the District Courts jurisdiction over certain suits against the United States, is not broad enough to permit the recovery of demands upon counterclaims. We think that that statute refers to original suits and prescribes procedure inconsistent with its use as the basis of a counterclaim.' In United States v. Shaw, supra, [309 U.S. 495, 60 S.Ct. 662, 84 L.Ed. 888], the court said: 'Against the background of complete immunity we find no Congressional action modifying the immunity rule in favor of cross-actions beyond the amount necessary as a set-off.' If this court were to take cognizance of defendant's counterclaim and give judgment upon it, it would exceed its specifically defined jurisdiction of suits against the United States under the Tucker Act. The United States is merely a nominal party plaintiff and made plaintiff only because of the requirement expressed in the Miller Act. It has no actual pecuniary interest. The suit is for the benefit of the subcontractors, and upon its successful prosecution, they only will receive the benefits of the judgment. That this is true is indicated by the provision in the Miller

Act that 'the United States shall not be liable for the payment of any costs or expenses of any such suit.' 40 U.S.C.A. §270b." *Id.* at 11.

Thus we prefer to distinguish United States v. Roth on its facts, and on those facts it did not pass upon, rather than on the government's argument that the Chandler Act Amendment of 1938 changed §64(a) ((11 U.S.C. §104-(a)) taxes became claims) and did not change §68(a) (11 U.S.C. §108(a)). In the opinion of the second circuit, it did change the set-off provisions by including the United States as a "creditor" for certain purposes, though not for all. With this, we agree.

But appellant also relies heavily upon In re Ward, D. Colo., 1955, 131 F.Supp. 387. There an opinion and a supplemental opinion rendered by Referee Hilliard were upheld by Chief Judge Knous. The latter does not discuss the law, being satisfied with the Referee's reasoning. The Referee's supplemental opinion took the position that §23(b) of the Bankruptcy Act (11 U.S.C.A. §46(b)).[5]

> "is as applicable to the United States as it would be to any other unsecured claimant who has filed a claim in the proceeding, for there is nothing in the Act, excepting the priority of payment mentioned, to indicate that the government is to be accorded any rights or privileges denied to other creditors. . . . Thus . . . it was the intention of Congress to waive the immu-

[5] 11 U.S.C. §46(b) reads as follows:

"Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title. July 1, 1898, c. 541, §23, 30 Stat. 552, Feb. 5, 1903, c. 487, §8, 32 Stat. 798; June 25, 1910, c. 412, §7, 36 Stat. 840; May 27, 1926, c. 400, §8, 44 Stat. 664; June 22, 1938, c. 575, §1, 52 Stat. 854."

> nity of the United States from suits in matters arising out of the participation of the United States as a claimant in bankruptcy proceedings. . . . If this were not so the government would be in a position to 'reach out with Briarean arms to gather the benefits * * *; and then draw back under the protection of its sovereign immunity, even while an accounting upon its claim before the Referee in bankruptcy is in progress.' In re Ward, *supra*, at 396.

Referee Hilliard then pointed out that he had "assumed that the United States had consented to the jurisdiction, but this is now disputed"; that the government had failed to argue the matter in its briefs, as ordered; that,

> "the government [had] ignored the issue and confined the arguments to the merits. It was not until after the Referee had made his findings and order, leaving nothing to be done but settlement of the decree, that the government asserted a lack of jurisdiction. *This came too late.*" *Ibid.* [Emphasis added.]

The Referee then held the government could consent, and had waived any right of objection:

> "that the United States consented to such jurisdiction both by the filing of its unsecured claims and by waiver of any rights of objection." *Id.* at 397.

The Referee cited authorities to the effect that there *can* be waiver in an ordinary case where the government is *not* a party. He recited that the government raised the issue in the Ward matter, and that he had ordered the matter argued in the briefs, but it was not. From this he found a waiver, and that the assertion of lack of jurisdiction came too late.

Both these conclusions of Referee Hilliard are questionable. Lack of jurisdiction can always be raised—it never comes too late. United States v. U.S. Fidelity Co., *supra*, at 513-514. And on the facts recited, a waiver is, to say the least, questionable.

The cases cited by Referee Hilliard point out that the

> "Consent to proceed summarily may be *formally* expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure to make timely objection." Cline v. Kaplan, 1944, 323 U.S. 97, 99 [Emphasis added.]

citing MacDonald v. Plymouth County Trust Co., 1933, 286 U.S. 263.

In the case now before us there was certainly no formal consent, and the facts detailed to us show no waiver on the part of the government, nor any failure to make objection. Thus neither Cline v. Kaplan, *supra,* nor MacDonald v. Plymouth County Trust Co., *supra,* is apposite.

In Honeyman v. Hughes, 9 Cir., 1946, 156 F.2d 27, this Court held that one who makes no objection to an adjudication of his claim in a summary proceeding is not thereafter permitted to speculate on the outcome of the proceedings, and then, if he loses the decision, *for the first time understandably protest the procedure.* That was not the factual situation in In re Ward, nor was it here.

None of the other cases cited in In re Ward supports the "too late" theory, and none of the cases cited therein supports the theory that a balance may be struck and a judgment awarded against the claimant when the claimant is the government having sovereign immunity (to wit: Cline v. Kaplan, *supra*, Alexander v. Hillman, 1935, 296

U.S. 222; MacDonald v. Plymouth County Trust Co., *supra*; Columbia Foundry v. Lochner, 4 Cir., 1949, 179 F.2d 630; Florence v. Presage, 4 Cir., 1938, 93 F.2d 784).

The doctrine of sovereign immunity may be waning—it may not, as Mr. Justice Frankfurter stated in National City Bank of N.Y. v. Republic of China,[6] have been favored by the test of time. But it has existed for many years, is a "well settled rule" and ordinarily "an insuperable objection to allowance,"[7] and until Congress says it does not exist, we are not prepared to strike it from the body of the law, or to ignore it.

Express statutory consent to suit is essential to avoid the claim of the sovereign. That consent may not be found by implication in statutory provisions that omit all reference to the sovereign. (Cf. United States v. Sherwood, 1941, 312 U.S. 584.) Consent given by one statute and not given in another raises a legitimate inference that such legislative amendment was by design, not by inadvertence. (Cf. Johansen v. United States, 1952, 343 U.S. 427.)

It is doubtful if any court could by interpretation of or implication from legislation alone, create a consent that was not specifically enunciated by the Congress. Only Congress has the power to grant jurisdiction over the sovereign.

Failing to find a specific statutory waiver, and having no power to find one by implication or interpretation, we are bound by a long line of cases to hold that an affirmative judgment against the United States cannot be entered on a counterclaim without specific statutory authorization

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[6]1955, 345 U.S. 356.

[7]U.S. v. Roth, *supra*, at 577.

for affirmative relief against the government on the counterclaim as such. United States v. U.S. Fidelity Co., *supra*; United States v. Shaw, *supra*; Nassau Smelting Works v. United States, 1924, 266 U. S. 101, United States v. Merchants Transfer, 9 Cir., 1944, 144 F.2d 324; In re Clayton Magazines, 2 Cir., 1935, 77 F.2d 852, 854.

This does not mean that a party sued by the government may not recoup or set-off, United States v. U.S. Fidelity Co., *supra*, at 511, or that the government's claim may not be contested, Gardner v. New Jersey, 1947, 329 U.S. 565.

Nor is there merit to appellant's position that having once filed a claim, the sovereign is in the same position as a private suitor. United States v. Shaw, *supra*, and cases cited therein; United States v. U. S. Fidelity Co., *supra*; see also Case v. Terrell, 1870, 78 U.S. (11 Wall.) 199; United States v. Eckford, 1867, 73 U.S. (6 Wall.) 484. As already illustrated, affirmative recovery against the sovereign is not a corollary of the sovereign's right to sue or present a claim for bankruptcy adjudication.

We agree with the reasoning of Judge Lindley of the Seventh Circuit in the case heavily relied upon by the government, In re Greenstreet, Inc., 1954, 209 F.2d 660. Although that was a Tucker Act case, the specific question of consent under the Bankruptcy Act was considered. The court said:

> "Nor can consent to be sued be implied from the terms of the Bankruptcy Act. The trustee insists that the Act applies to the United States just as it does to any other person. But the United States, as a sovereign, is not bound by a statute which in its general terms would divest it of pre-existing rights or privileges. United States v. Wittek, 337 U.S. 346, 69 S.Ct. 1108, 93 L.Ed. 1406; United States v. United Mine Work-

ers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884. Moreover, the Supreme Court has specifically held that the United States is not subject to the general provisions of the Bankruptcy Act unless specifically named therein. Guarantee Title & Trust Company v. Title Guaranty & Surety Company, 224 U.S. 152, 155, 32 S.Ct. 457, 56 L.Ed. 706; United States v. Herron, 87 U.S. 251, 260-264, 22 L.Ed. 275. The sovereign immunity from suit is a right and privilege which can be divested only by specific congressional enactment so providing. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894.

The question remaining, therefore, is whether, by its intervention in the proceeding below, the United States consented to the jurisdiction of the court to entertain the counterclaim against the property. In the language of the Supreme Court, speaking in United States v. Shaw, 309 U.S. 495, 500-501, 60 S.Ct. 659, 661, 84 L.Ed. 888, 'As a foundation for the examination of that question we may lay the postulate that without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts. The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants.' Again, in Nassau Smelting & Refining Works v. United States, 266 U.S. 101, 106, 45 S.Ct. 25, 69 L.Ed. 190, the court said, 'The

objection to a suit against the United States is fundamental, whether it be in the form of an original action, or a set-off, or a counterclaim. Jurisdiction in either case does not exist, unless there is specific congressional authority for it.'

The postulate to be distilled from the cases is, as we have observed, that the United States, by initiating an action as a plaintiff, consents to the jurisdiction of the court to entertain any defensive plea including the right of set-off to the extent of the government's claim, but does not thereby consent to an affirmative judgment on a counterclaim. Stated differently, this consent empowers the court to decide all issues necessary to dispose of the general claim initiated by the government, but does not, as in the case of private litigants under the Federal Rules, extend to power to decide separate affirmative claims which the defendant may have by way of counterclaim. * * * The receiver argues that immunity was waived by the action of officers of the United States. This result is said to grow out of the fact that no answer to the counterclaim denying jurisdiction was filed. The argument, as we understand it, is that the government, by bringing suit, consented to the resolution of all questions that might be put in issue, as to the property owned by the government, and that, if the court did not have jurisdiction initially, failure of the government to answer acts as a waiver of immunity.

This argument ignores the settled rule that the government cannot lose its immunity by any act or omission of its agents, and that consent to be sued cannot be implied from the action or inaction of its officers. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed.

894 (failure to appeal an adverse judgment does not work an estoppel against the government); Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (stipulation by the United States Attorney for removal of a cause to a federal court does not give the court jurisdiction, where the state court in which the action was brought had none, notwithstanding the fact that the action might properly have been filed initially in the federal courts); Carr v. United States, 98 U.S. 433, 25 L.Ed. 209 (The Secretary of the Treasury could not waive the immunity of the United States from suit by participating in actions in state courts for possession of lands); North Dakota-Montana Wheat Growers' Ass'n v. United States, 8 Cir., 66 F.2d 573, 92 A.L.R. 1484, certiorari denied 291 U.S. 672, 54 S.Ct. 457, 78 L.Ed. 1061. Cf., United States v. Ringgold, 8 Pet. 150, 8 L.Ed. 899. The fact that the property here involved was in the custody of the bankruptcy court initially did not, we think, defeat the application of the rule.

We conclude that the District Court had jurisdiction to entertain and determine the trustee's counterclaims in so far as they ran against and asserted set-offs to lessen or defeat the government's unsecured claim for damages, but not to allow any part thereof, over and above the amount of the government's general claim, as an affirmative judgment against the United States, and, further, that the court had no jurisdiction to allow the trustee's counterclaim as a set-off against the government's title to property which belonged to it and which it was compelled to come to the court to reclaim." *Id.* at 607.

The judgment is *affirmed.*

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: August 28, 1958

PAUL P. O'BRIEN, Clerk

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No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1958

SARAH B. DANNING, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF SAMUEL N. SHERMAN, d.b.a. SOUTHERN CALIFORNIA COLLEGE OF BUSINESS, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
HERSHEL SHANKS,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 626

SARAH B. DANNING, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF SAMUEL N. SHERMAN, d.b.a. SOUTHERN CALIFORNIA COLLEGE OF BUSINESS, BANKRUPT, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum-opinion of the referee in bankruptcy (R. 25-36) is unreported. The district court wrote no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-13) is reported at 259 F. 2d 305.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 14) was entered on August 28, 1958. Time to petition the Court of Appeals for a rehearing expired on

September 27, 1958 (see Rule 23, Rules of the United States Court of Appeals for the Ninth Circuit). The time to petition this Court for a writ of certiorari expired on November 26, 1958. On December 2, 1958, petitioner filed an application with the Court of Appeals for leave to file a petition for rehearing and reconsideration out of time (R. 81-86). On December 8, 1958, the Court of Appeals for the Ninth Circuit granted petitioner's application to file a petition for rehearing and reconsideration (R. 98). The following day, December 9, 1958, the petition for rehearing was denied (R. 108). The petition for certiorari was filed on January 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

1. Whether a bankruptcy court has summary jurisdiction to award an affirmative judgment against the United States on a counterclaim.

2. Whether, once the time to petition for certiorari has expired, this Court is revested with jurisdiction by a court of appeals order granting a subsequent application for leave to file a petition for rehearing out of time when the petition for rehearing itself is subsequently denied.

STATUTE INVOLVED

Section 68(a) of the Bankruptcy Act, 52 Stat. 878, 11 U.S.C. 108(a) provides as follows:

> (a.) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a

creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

STATEMENT

Petitioner, a trustee in bankruptcy, here seeks review of an order of a referee in bankruptcy dismissing the trustee's affirmative counterclaim against the United States for lack of jurisdiction. The referee's order was affirmed both by the district court and by the Court of Appeals.

Following an adjudication of bankruptcy on an involuntary petition filed by the bankrupt's creditors, the United States filed a preliminary proof of claim against the bankrupt's estate in the amount of $322,861.09, (R. 11-15). A later proof of claim filed by the United States increased the amount to $834,631.18 (R. 16-18). This claim was based on the bankrupt's submission of, and payment by the United States on, fraudulent vouchers for allegedly furnishing education and training to eligible veterans (R. 12-13). The trustee filed preliminary objections to the allowance of the Government's claim and, in addition, filed a counterclaim in an unspecified amount for sums due under contracts between the bankrupt and the Government for the education and training of veterans (R. 19-23).

After prolonged negotiations, the parties were unable to arrive at a settlement of their respective ob[illegible]tions (R. 27). The Government thereupon n[illegible]d to withdraw its claim and to dismiss the trustee's counterclaim (R. 24-25) in order that the matter might be settled in a single litigation in the

Court of Claims, at which time the Government could present its claim as a defense to the suit. The referee, after briefs and argument, concluded that the bankruptcy court did not have jurisdiction to render affirmative relief against the United States (R. 25-36). Accordingly, it granted the Government's motion allowing it to withdraw its claim and, since any recovery by the trustee would then amount to affirmative relief against the Government, dismissed the counterclaim for lack of jurisdiction (R. 37-38). Against a background of complete sovereign immunity, the referee was unable to find in the Bankruptcy Act a waiver of this immunity, either express or implied, as concerns an affirmative counterclaim by a trustee in bankruptcy. On review of the referee's order by the district court, sitting as a court of bankruptcy, that court affirmed without opinion (R. 50-51). On appeal to the Court of Appeals for the Ninth Circuit, that court too affirmed:

> Failing to find a specific statutory waiver, and having no power to find one by implication or interpretation, we are bound by a long line of cases to hold that an affirmative judgment against the United States cannot be entered on a counterclaim without specific statutory authorization for affirmative relief against the government on the counterclaim as such. [259 F. 2d 305, 309-310.]

* * * *

The judgment of the Court of Appeals was filed on August 28, 1958 (Pet. App. 14). Thereafter, petitioner applied for a stay of mandate because of her intention to file a petition for a writ of certiorari in

this Court (R. 87). An order staying the issuance of the mandate until November 27, 1958, was issued by the Court of Appeals on October 23, 1958 (R. 87). One day after the time to petition for certiorari had expired, two separate petitions were received by the Clerk of this Court (R. 88). Following telephonic and telegraphic communications between the Clerk and counsel for petitioner, the Clerk was instructed not to docket the case (R. 88). Thereafter, on December 2, 1958, petitioner moved the Court of Appeals for leave to file a petition for rehearing and reconsideration out of time [1] (R. 81-86). On December 8, 1958, the Court of Appeals granted petitioner's application for leave to file a petition for rehearing (R. 98) and on the following day denied the petition for rehearing (R. 108).

ARGUMENT

1. It is well settled that the sovereign's traditional immunity from suit prevents the award of an affirmative judgment against it on a counterclaim, unless there is specific statutory consent thereto. *United States* v. *Shaw*, 309 U.S. 495; *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506; *Nassau Smelting Works* v. *United States*, 266 U.S. 101; *United States* v. *Eckford*, 6 Wall. 484; *Reeside* v. *Walker*, 11 How. 272; see *De Groot* v. *United States*, 5 Wall. 419, 431. The narrow question presented by this petition is whether the necessary specific statu-

[1] Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit allows thirty days after judgment in which to file a petition for rehearing.

tory consent to such an award exists in this case; that is, whether the Bankruptcy Act contains specific language conferring summary jurisdiction on the bankruptcy court to award an affirmative judgment against the United States on a counterclaim.

At the outset, petitioner is faced with the holding of this Court in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506.[2] That case ruled that an affirmative judgment against the United States rendered on a counterclaim in a bankruptcy reorganization proceeding was void because the bankruptcy court lacked jurisdiction to award affirmative relief against the sovereign.[3] In an earlier bankruptcy reorganization proceeding, the Government's claim against the debtor had been allowed in the amount of $2,000, but the debtor's counterclaim had been allowed for over $11,000, and the bankruptcy court had awarded a judgment against the United States for the difference. When this judgment was later brought in issue in a subsequent suit, this Court held the judgment void because the bankruptcy court was without jurisdiction to award affirmative relief against the United States in these

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[2] See also the companion case, *United States* v. *Shaw*, 309 U.S. 495.

[3] The general provisions of the Bankruptcy Act were fully applicable to reorganization proceedings under former Section 77B, except insofar as inconsistent with that Section. See Section 77B(k), 48 Stat. 921, and Section 77B(o), 48 Stat. 922. The petitioner has made no claim here or in the courts below that the case can be distinguished on the ground that it was a bankruptcy reorganization proceeding rather than straight bankruptcy.

circumstances: "No statutory authority granted jurisdiction to the Missouri [bankruptcy] court to adjudicate a cross-claim against the United States." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. at 512.

In an attempt to avoid the effect of this decision, petitioner argues that this result has now been changed by the 1938 amendments to the Bankruptcy Act, known as the Chandler Act (52 Stat. 840). Although petitioner frequently reiterates this contention (Pet. 12, 13-14, 16), nowhere does she call the Court's attention to specific language in the Chandler Act amendments which allegedly accomplishes this result. Section 68(a) of the Bankruptcy Act, which appears to be the sole section on which petitioner relies, was in force *in haec verba* prior to the Chandler Act amendments and at the time of this Court's decision in the *United States Fidelity & Guaranty* case.

Moreover, the language of Section 68(a) can hardly be said to contain a specific grant of jurisdiction to a bankruptcy court to render an affirmative judgment on a counterclaim against the United States. It provides as follows (11 U.S.C. 108(a)):

> In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

As noted above, "without *specific* statutory consent, no suit may be brought against the United States." *United States* v. *Shaw*, 309 U.S. 495, 500-501. (Em-

phasis supplied.) As this Court stated in *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686, "The sovereignty of the United States raises a presumption against its suability, unless it is *clearly* shown". (Emphasis supplied.) "Limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied", *Soriano* v. *United States*, 352 U.S. 270, 276. See also, *United States* v. *Sherwood*, 312 U.S. 584, 590-591, and cases there cited. With these principles of construction relating to waivers of sovereign immunity in mind, it hardly seems open to doubt that Section 68(a) contains no waiver of sovereign immunity.

Finally, whatever effect Section 68(a) has with respect to the award of an affirmative judgment on a counterclaim against a private party,[4] it cannot

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[4] While a majority of courts have sanctioned the entry of an affirmative judgment on a counterclaim against a private party, these decisions have been based, not on Section 68(a), but on the consent to jurisdiction of the counterclaim implied in the filing of the claim. *In re Majestic Radio & Television Corp.*, 227 F. 2d 152 (C.A. 7), certiorari denied, *sub nom. Dwyer et al., Trustees*, v. *Franklin*, 350 U.S. 995; *Inter-State National Bank of Kansas City* v. *Luther*, 221 F. 2d 382 (C.A. 10), certiorari dismissed, 350 U.S. 944; *Conway* v. *Union Bank of Switzerland*, 204 F. 2d 603 (C.A. 2), certiorari dismissed, *sub nom. Silesian Holding Co.* v. *Union Bank of Switzerland*, 350 U.S. 978; *In re Solar Manufacturing Corporation*, 200 F. 2d 327 (C.A. 3), certiorari denied, *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U.S. 940; *Columbia Foundry* v. *Lochner*, 179 F. 2d 630 (C.A. 4); *Chase National Bank* v. *Lyford*, 147 F. 2d 273 (C.A. 2); *Floro Realty & Investment Co.* v. *Steem Electric Corp.*, 128 F. 2d 338 (C.A. 8); *Florance* v. *Kresge*, 93 F. 2d 784 (C.A. 4); *In re Nathan*, 98 F. Supp. 686 (S.D. Calif.). See also *Alexander* v. *Hillman*, 296 U.S.

apply to the Government, since it has frequently been held that a general provision of the Bankruptcy Act does not apply to the United States unless it is specifically mentioned in that provision.[5] *Guarantee Co.* v. *Title Guaranty Co.*, 224 U.S. 152, 155; *Lewis* v. *United States*, 92 U.S. 618, 622; *United States* v. *Herron*, 20 Wall. 251, 260-264. Thus, for example, until Congress made time limitations for filing claims specifically applicable to the United States,[6] failure to file timely did not preclude the Government's claim. *Villere* v. *United States*, 18 F. 2d 409 (C.A. 5), certiorari denied, 275 U.S. 532; *In re Menist*, 294 Fed. 532 (C.A. 2); *United States* v. *Birmingham Trust & Savings Co.*, 258 Fed. 562 (C.A. 5), cer-

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222. Petitioner's attempt to apply this argument to the United States (R. 20-22) may be dealt with shortly, since it was answered in this Court's decision in *United States* v. *Shaw*, 309 U.S. 495, 500-501:

> Whether * * * jurisdiction exists depends upon the effect of the voluntary submission to the Michigan court by the United States of its claim against the estate. As a foundation for the examination of that question we may lay the postulate that without specific *statutory* consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. [Emphasis supplied.]

See also *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513.

[5] This is no more than an application of the general principle that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. See, *e.g.*, *United States* v. *Wittek*, 337 U.S. 346, 359; *United States* v. *United Mine Workers*, 330 U.S. 258, 272.

[6] See Section 57(n) of the Bankruptcy Act, 11 U.S.C. 93(n).

tiorari denied, 251 U.S. 550. For a continuing application of this principle after the Chandler Act, see *Sampsell* v. *United States*, 205 F. 2d 490 (C.A. 9).

The only other appellate consideration since the Chandler Act of the jurisdiction of a court of bankruptcy to award an affirmative judgment against the United States on a counterclaim is in complete accord with the decision of the Court of Appeals in the instant case. *In re Greenstreet, Inc.*, 209 F. 2d 660 (C.A. 7); see also *In re Monongahela Rye Liquors*, 141 F. 2d 864 (C.A. 3).[7]

Contrary to petitioner's assertion, the decision of the Second Circuit in *United States* v. *Roth*, 164 F. 2d 575, is not in conflict with the instant case. The *Roth* case decided only that the bankruptcy court had jurisdiction to entertain a defensive counterclaim against the United States to the extent of its claim, a contention which we do not dispute here. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506. Indeed, the court in *Roth* specifically noted that "[w]hether the bankruptcy court could enter an affirmative judgment against the United States, if the bankrupt's counterclaim had exceeded the Government's claim, is not presented by this record and need not be considered." (164 F. 2d at 578, n. 7).

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[7] *In re Ward*, 131 F. Supp. 387 (D. Colo.), a district court decision adopting the referee's opinion, appears to conflict with the instant case and with the *Greenstreet* case; Moreover, the conclusion in the *Ward* case that "the United States could consent to the summary jurisdiction of the Referee and that by its conduct it waived any right of objection" (131 F. Supp. at 397) seems plainly wrong. See footnote 4, *supra*, pp. 8-9.

2. There is some doubt whether this petition for certiorari has been timely filed. After both the time for filing a petition for rehearing in the Court of Appeals[8] and the time for filing a petition for certiorari in this Court had expired, petitioner filed a motion in the Court of Appeals for leave to file a petition for rehearing out of time (R. 81-86). This motion for leave to file was granted on December 8, 1958, and the rehearing itself was promptly denied the next day. The precise question as to whether the time within which to file a petition for certiorari, once having expired, may be revived by a court of appeals order granting leave to file an untimely petition for rehearing has apparently never been passed on by this Court. Stern and Gressman, *Supreme Court Practice* (2d ed.), pp. 163-165; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed.), pp. 768-773, 826.

Analogous cases in courts of appeals suggest that the Ninth Circuit's action here cannot have the effect of reviving the time limit on a petition for certiorari. As stated by the Court of Appeals for the District of Columbia Circuit, "a party may not avoid the effect of a mandatory rule or statute limiting the time [to appeal] by filing late a motion for rehearing, even where the motion is considered on its merits." *Safeway Stores, Inc.* v. *Coe*, 136 F. 2d 771, 775 (C.A.D.C.). See also *Nealon* v. *Hill*, 149 F. 2d 883 (C.A. 9), certiorari denied, 326 U.S. 753; *Marden* v. *Campbell Printing-Press & Mfg. Co.*, 67 Fed. 809

[8] See Rule 23, Rules for the United States Court of Appeals for the Ninth Circuit.

(C.A. 1). It has also been held that a petition for rehearing in a court of appeals must be filed before the time to take the case to this Court expires. *Conboy* v. *First Nat. Bk. of Jersey City*, 203 U.S. 141, 145.[9]

On the other hand, this Court has stated in *Bowman* v. *Loperena*, 311 U.S. 262, 266, that:

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

See *Pfister* v. *Finance Corp.*, 317 U.S. 144. Cf. *F.T.C.* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211-213.

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[9] *Conboy* v. *First Nat. Bk. of Jersey City*, *supra*, may have been overruled. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, *supra*, pp. 770-771.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
HERSHEL SHANKS,
Attorneys.

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